Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
DAVID M. SILBERMAN
BREDHOFF, GOTTESMAN, COHEN, CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

80

TABLE OF AUTHORITIES

Cases: Page

Commissioner v. *Duberstein*, 363 U.S. 278 (1960).. 6
East v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975).. 4
Graver Mfg. Co. v. *Linde Co.*, 339 U.S. 605 (1950).. 6
Teamsters v. *United States*, 431 U.S. 324 (1977).. 5, 6
Texas Dept. of Community Affairs v. *Burdine*, 49 U.S.L. Week 4214 (1981) ..... *passim*
United States v. *Gypsum Co.*, 333 U.S. 364 (1948).. 6
United States v. *Singer Mfg. Co.*, 374 U.S. 174 (1963) 6

Statutes and Rules:

Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) ..... *passim*
9 Wright and Miller, Federal Practice and Procedure, § 2587 (1971) 6
Federal Rules of Civil Procedure 52(a) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS[1]

Introduction

In our petition we showed that there is a conflict between the Fifth and Seventh Circuits, on the one hand, and the other nine circuits, on the issue whether a court of appeals may "independently determine" the existence of discriminatory purpose free of the requirements of

---

[1] Respondents' response was filed in this Court on March 18, 1981, but it was not received by counsel for petitioners until March 23, 1981. Because of the date of receipt, counsel for petitioners mistakenly assumed that the case would not be considered by this Court until its April 17, 1981, conference. On April 1, 1981, counsel discovered that instead the petition was set to be considered at the conference on April 3, 1981. In these circumstances, only a typewritten brief could be provided to the Court in sufficient time to permit consideration prior to the conference. The brief is hereby resubmitted in printed form.

Rule 52(a), F.R.Civ.P. (Pet. at 20-22). That issue was then pending before this Court in another case from the Fifth Circuit, *Texas Dept. of Community Affairs* v. *Burdine*, No. 79-1764. But the Court has since decided *Burdine* on other grounds, leaving for another day the question "whether [the Court of Appeals] erred in not reviewing the District Court's finding of no intentional discrimination under the 'clearly erroneous' standard of Federal Rule of Civil Procedure 52(a). . . ." 49 U.S.L. Week 4214, 4217 n. 12 (March 4, 1981).

Respondents do not deny that there is a conflict among the circuits on this issue, nor that the issue is worthy of plenary consideration by this Court. Rather, respondents contend that in this case the Fifth Circuit did not apply the standard of review it has applied in *Burdine* (and other cases) in overturning district court findings of the absence of a discriminatory purpose. Respondents' effort in this regard takes two forms.

First, respondents seek to obscure the issue by suggesting, through the presentation of a selective and misleading description of record evidence never cited in any of the lower courts' opinions, that the evidence points so ineluctably to a finding that the USW seniority system was the product of a discriminatory purpose that no court could have done other than find the district court's contrary finding "clearly erroneous." Respondents' effort obliges us to cite the record evidence which refutes their suggestion (see Part I, *infra*, and the Appendix to this reply brief).

Second, respondents misconstrue the Fifth Circuit's statement of the standard of review it was applying in the instant case, overlooking that the very standard they attribute to the decision below (Br. Op. 22-23) is the one which conflicts with nine other circuits. We show this in Part II, *infra*, where we also address respondents' other efforts to distinguish the decision below from *Burdine*.

I.

Respondents, like the court below, do not dispute, indeed ignore, the central findings that led the district court to conclude that the USW seniority system was not discriminatorily motivated: the system was the product of the aims and policies of a union in which blacks have always played a major role and whose negotiating committee has at all times consisted of equal numbers of black and white employees; the system—both with respect to the use of departmental age as the measure of seniority and with respect to the designation of the departments within which that seniority was exercised—is fully in accord with seniority systems throughout the railroad equipment industry, including systems at virtually all-white plants (indeed at virtually all-white plants of the same employer, Pullman-Standard).

Rather, respondents, like the court below, pick out of context certain alleged incidents affecting a handful of employees in the huge USW bargaining unit, and contend that these incidents require a finding of discriminatory purpose, apparently no matter what else the record may show. Thus, for example, they build a monument to the transfer of 24 black employees from the IAM bargaining unit to the USW unit in 1941-42 and to the "creation" of five "one-race" departments, involving a total of 51 employees, in the USW unit at sometime between June 1, 1953 and June 1, 1954. They neglect to mention the reasons for, and the context of, these incidents, which, when understood, leave no room for an inference of discrimination on the part of USW even as to the incidents themselves. (Respondents having omitted the information necessary to understand the significance of these and the other incidents they discuss, we have furnished that information in an Appendix to this reply brief so that consideration of the petition will not be prejudiced by respondents' misleading description of the record). But more important, respondents never explain why evidence that a handful of employees were in "one-

race" departments is more indicative of the intent behind a seniority system than the fact that 90% or more of the employees—*i.e.*, 90% of the blacks and 90% of the whites—were located in racially-mixed departments. Appendix, *infra* at 2a-3a, 7a.

It simply remains true that the record evidence does not permit a finding that USW's seniority system was motivated by racial discrimination, much less that the district court was "clearly erroneous" in finding the absence of such motivation. And, of course, the court below did *not* determine the district court's finding to be "clearly erroneous" as we demonstrate further in Part II, *infra*.

II.

In our petition, we described the Fifth Circuit's view, articulated in decisions such as *Burdine*, and *East* v. *Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975), that appellate courts are to make an "independent determination," "free of the clearly erroneous rule," of the question whether conduct was motivated by a discriminatory purpose. Respondents do not dispute that the Fifth Circuit's decisions in *East, et al.*, conflict with decisions of other circuits. Rather, they contend that in *this* case the Fifth Circuit did not apply the standard of review which its other decisions have announced to be the proper standard. But in attempting to prove this contention, respondents prove the opposite. Here, say respondents, "the Court of Appeals properly notes that while appellate courts can overturn *subsidiary* facts only under the clearly erroneous standard, they can, and indeed are under a duty to, make *an independent determination* of whether a violation of Title VII has been established" (Br. Op. 22-23, emphasis added). But respondents overlook that the point of *East*, and the other Fifth Circuit decisions cited at Pet. 21, n. 14, is that this very principle requires appellate courts to make an "independent determination" of whether "discriminatory purpose" exists, in those cases where discriminatory purpose is the

sine qua non for finding a violation. Under the Fifth Circuit doctrine, in such cases discriminatory purpose is both "a question of fact" and "the ultimate issue for resolution"—an "ultimate fact question as distinguished from subsidiary fact questions"—and on questions of "ultimate fact" "[w]e may reverse free of the clearly erroneous rule" (518 F.2d at 339; see also App. 15a, n. 6, quoting *East*).[2]

Respondents proffer two other justifications for the court's ignoring Rule 52(a) in this case, both of which are frivolous as we show in footnotes: (1) that this was a "paper case" in which adherance to Rule 52(a) is not required[3]; and (2) that the court was freed of Rule

---

[2] Throughout this brief, "App." refers to the Appendix in No. 80-1193, *not* No. 80-1190.

[3] The contention that adherance to Rule 52(a) was not required because this is a paper case (Br. Op. 25-27) is doubly flawed:

First, the seniority system was a primary focus of all three trials, and not merely the last trial as respondents suggest. To be sure, the district court, after this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), granted respondents' motion for a limited new trial for "presentation of *additional* evidence relevant to the issue of the validity of the seniority system under Section 703(h)" (A. 47a, emphasis added), and the one-day trial which ensued consisted largely of introduction of documentary evidence. But throughout the prior 18 days of trial the validity of the seniority system had been the principal issue in the case, and the parties had introduced voluminous evidence describing the origins and workings of the seniority system which underpinned the court's ultimate determinations respecting the system's validity. The intimate familiarity with the seniority system which the district court had acquired by reason of the evidence introduced at the earlier trials is reflected in its decisions issued following the first and second trials (see, especially, App. 118a-145a, 49a-58a). Thus, while the dispositive issue had changed by reason of this Court's decision in *Teamsters*, the evidence introduced at the prior trials was relevant to, and relied upon by the district court, in resolving that issue.

Second, in any event Rule 52(a) remains applicable even when questions of motive are to be determined primarily or exclusively

52(a) because the district court committed "errors of law".[4]

---

from voluminous documentary evidence. That "the deference that must normally be paid to the findings by the trial court applies when the finding rests on an inference drawn from undisputed facts or documentary evidence" is established by "the clear language of the rule, two notes of the Advisory Committee, and pointed expressions from the Supreme Court." 9 Wright and Miller, *Federal Practice and Procedure*, § 2587, p. 740 (1971). See *United States* v. *Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *Graver Mfg. Co.* v. *Linde Co.*, 339 U.S. 605, 609-610 (1950).

[4] Respondents declare that "where findings are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand" (Br. Op. 24-25), and they insist that the district court committed numerous errors of law (*id.* 24 n.27). But the court below did not say that the district court committed legal error. Indeed, there was no disagreement between the district court and the court below as to the legal principle which controls this case; both courts understood that, as *Teamsters* held, the validity of the seniority system turned on the existence or non-existence of discriminatory purpose (Cf. App. 43a-44a, with App. 8a). The court below disagreed not with the legal standard applied by the district court, but with the district court's finding that there was no discriminatory purpose in the negotiation and maintenance of USW's seniority.

Two of the matters which respondents erroneously declare to be "legal" errors by the district court warrant further discussion. Both in reality are not legal questions, but rather questions as to the evidentiary significance of certain facts.

The first is the motivation of the IAM in agreeing to the transfer of jobs of 24 black employees to the USW unit in 1941-1942. The district court regarded as irrelevant the IAM's motivation. (App. 36a-37a, 42a). The court of appeals, although agreeing with the district court that USW was not discriminatorily motivated in receiving the 24 employees (App. 16a), attributed great significance to the IAM's motivation in making the transfer (a motivation which the court of appeals believed to be to rid the IAM unit of blacks (App. 15a)). Because this case involves *only* the validity of the seniority system in the USW bargaining unit (see App. 26a and n.2, 34a) the district court was correct in treating the IAM's motivation as irrelevant. It might well be that the

The court below did not review the district court's finding of no discriminatory purpose under the "clearly erroneous" standard, but rather undertook to carry out its self-proclaimed responsibility to make an "independent determination" of the "ultimate fact question" whether the seniority system was negotiated and maintained with a discriminatory purpose. Its opinion was written from that perspective (Pet. 21, n. 14); it ignored the undisputed facts upon which the district court based its finding (see p. 3, *supra*); and it substituted a self-styled "find[ing]" (App. 16a) which is so conclusorily reasoned and devoid of articulated evidentiary foundation that re-

---

seniority system in the IAM unit would not pass muster under § 703(h) of Title VII, i.e., that the employees who but for the IAM's wrongfully motivated action would have remained in its unit are entitled to the seniority credit in the IAM unit that they would have enjoyed had the transfer not occurred. However, insofar as those employees seek seniority rights to claim jobs within the USW unit (and only those rights are at issue in this case), the resolution depends upon whether USW's seniority system was discriminatorily motivated. Since the IAM had no part in the negotiation of USW's seniority system, its bad motive (if such there was) is irrelevant to the factual issue presented in this case.

Second, respondents fault the district court for finding a seniority system to be neutral "because in effect, it locks white employees out of the lower paying black departments to the same extent that it locks black employees out of higher paying white departments." Br. Op. 10. That is not what the district court said, and it is not what the record supports. The district court recognized that if a seniority system had a greatly disparate impact along racial lines that might be probative of discriminatory purpose (App. 29a). But here, the district court found that the seniority system "affects significant numbers of white and black employees—and does so in an identical manner" *ibid.* There were 26 departments in the USW unit; those departments varied widely in their desirability; with respect to each such department, the system impacted equally upon all whites and blacks who might desire to enter that department; and thus the relative impact upon blacks and whites was not so disparate as to warrant an inference, overcoming all of the evidence pointing the other way, that race was a motivating factor, *id.* 29a-30a.

spondents have been compelled to submit an appendix attempting to fill the gap.

Respondents do not contend (as they in truth could not) that the Court of Appeals actually relied upon the evidence proffered in their appendix—that evidence is not recited in the court's opinion. Instead, respondents treat the Court of Appeals' opinion as though it were a district court opinion, and undertake to demonstrate that the Court of Appeals' "find[ing]" is supported by record evidence. Having made that attempt, they dismiss our petition as merely a quarrel over the sufficiency of fact findings—here, appellate fact findings (Br. Op. and n. 10). Respondents' approach reflects, indeed highlights, that the issue we ask this Court to decide as to the deference owed by appellate courts to district courts' fact findings is squarely presented in this case.

CONCLUSION

For the reasons set forth in the petition, and above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
DAVID M. SILBERMAN
BREDHOFF, GOTTESMAN, COHEN, CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

Attorneys for Petitioners

APPENDIX

APPENDIX

THE USWA SENIORITY SYSTEM

A. *Unionization and the Events of 1941-42*

Pullman commenced operations in 1929, but unionization did not occur until 1941. In 1941, USW filed a petition with the NLRB seeking a bargaining unit of all hourly employees. *Pullman-Standard Car Mfg. Co.*, 35 NLRB 378, 381 (1941). Two other unions, IAM and IBEW, filed petitions seeking to carve out separate bargaining units for craft and craft-related employees within their respective jurisdictions. *Ibid.*[1] There eventuated an NLRB evidentiary hearing, at which USW vigorously opposed the creation of separate craft bargaining units, and urged that there be but one bargaining unit encompassing all hourly employees (PX 13). Despite USW's efforts, the NLRB created three separate bargaining units. *Pullman, supra*, 35 NLRB at 384-385.

Following the NLRB certification, each union negotiated a separate collective bargaining agreement with the Company which defined, *inter alia*, the seniority system applicable to the jobs within its bargaining unit. (PX 18, 33). Thus, there were three separate seniority systems, and they were different. IAM negotiated a job seniority system (App. 26a-27a), whereas USW negotiated a departmental seniority system (App. 40a). IAM, of course, did not participate in the negotiation of USW's seniority system (App. 36a-37a).

As noted, USW's first collective bargaining agreement created a departmental seniority system, with seniority

---

[1] Respondents state that "[i]n its petition to the NLRB the IAM sought to exclude blacks from its bargaining unit" (App. B, 5). The IAM petition made no reference to race, and at the NLRB representation hearing IAM expressly stated that it wanted its unit to include all employees who met its unit description regardless of race (PX 13 at 148).

applicable only to layoffs and recalls. (PX 33; App. 40a).[2] Departments were not defined in USW's agreement, but consisted of the departments which the Company had established for operational purposes prior to unionization. (PX 1, 33). The only change in departmental structure in the USW bargaining unit occurring at the time of unionization was that resulting from the NLRB's placement of some jobs in the Die and Tool and Maintenance Departments in the IAM unit, and other jobs in those departments in the USW unit. There emerged a Die and Tool (CIO) Department, and a Maintenance (CIO) Department, in the USW bargaining unit, but those departments no longer contained the jobs which the NLRB had placed in the IAM unit (App. 35a-36a).

The vast majority of employees in the USW bargaining unit, both black and white, were in racially-mixed departments. (PX 1). There were four departments, containing 47 employees, in the USW bargaining unit in which the employees were all of one race; the remaining employees in USW's unit, numbering over 1,000, were in racially-mixed departments. *Id.* The "one race" composition of the four small departments was not dictated by USW's contract; it was the result of the Company's having assigned only employees of one race to the handful of jobs in those departments: three of those departments (Lumber Yard, Plant Protection, and Template), contained only whites at the time of unionization; the fourth, Die & Tool (CIO), consisted of three blacks employed on the only jobs in the Die & Tool Department not placed in the IAM unit by the NLRB's certification. *Id.*

In early 1942, the NLRB amended the bargaining unit descriptions pursuant to a request made by the unions in December, 1941. (CX 14; PX 17, pp. 14-16; App. 34a,

[2] USW did not obtain the application of seniority to promotional decisions until 1956 (App. 26a).

n. 13). The effect of the amendment was to move jobs held by 24 blacks from the IAM unit to the USW unit, and jobs held by 2 whites from the USW unit to the IAM unit. The contemporaneous documents reflect that the reason for the requested amendment was that the Board had made certain errors in its description of the IAM's bargaining unit. (PX 17, pp. 14-15). (For example, the Board had included in the IAM unit "employees in the wheel, axle, and truck shop," *Pullman-Standard Car Mfg. Co.*, 36 NLRB 1124, 1127 (1941), but Wheel and Axle was a separate department from Truck (PX 1), IAM had not sought inclusion of the Truck Department in its unit (PX 13 at 30), and USW wanted the Truck Department in *its* unit (PX 17, p. 15).[3]

The district court did not decide whether the IAM was motivated by race in seeking the amendment, deeming the IAM's motives irrelevant to the *bona fides* of the USW seniority system (App. 42a), but the court expressly found that USW and the Company were *not* motivated by race (App. 42a, 36a-37a). The Court of Appeals believed that "[t]he obvious principal aim of the IAM in 1941 was to exclude black workers from its bargaining unit" (App. 15a), but that court, too, recognized that USW had not been motivated by race; rather, USW sought the amendment "in the interest of increased membership" (App. 16a).

As respondents acknowledge (App. B, p. 9, n. 9), the effect of the original certification and of the amendment was to create only one new, "one race" department in

[3] The Truck Department contained 14 of the 24 blacks who moved from the IAM unit to the USW unit as a result of the amended certification. PX 1. Respondents state that the NLRB had initially combined Truck with Wheel and Axle because of functional relationships between the jobs therein. App. B, 6. But respondents' record citations do not support this statement, and the NLRB's decision recites that it defined the IAM unit to include "the employees . . . claimed by the I.A.M." 35 NLRB at 382.

the USW unit, i.e. the Die and Tool (CIO) Department, described above, which had three employees (PX 1).

B. *Events Between 1944 and 1946*

In 1944, USW petitioned for an election in which it hoped to oust IAM as the exclusive bargaining representative of the employees in what was then the IAM unit (CX 14). USW's petition was settled, on the eve of the NLRB hearing, by an agreement transferring all but two of the departments in the IAM unit to the USW unit. (Herring Dep. at 10-12; App. 36a, n. 17) The two departments which remained in the IAM unit were Die and Tool (IAM) and Maintenance (IAM). (PX 2). The transfer of departments moved 100 employees over to the USW unit, leaving only 50 (all white) in the IAM unit (PX 2).

In 1946, the IBEW was decertified as bargaining representative in the Powerhouse Department, and those jobs were merged into the racially-mixed Maintenance Department in the USW unit. App. 41a; PX 1, 2.

C. *Events In The Early 1950's*

In 1947, at the behest of a black member of the USW negotiating committee (CX 8, Minutes of May 13, 1947), the USW contract was amended to provide for occupational, rather than departmental seniority (still applicable only to layoffs and recalls, see p. 2a, n. 2, *supra*). PX 38.

Respondents state that in June, 1954, USW and the Company removed certain jobs from racially-mixed departments and placed them into newly created "one race" departments, and that two months later they negotiated a return to departmental seniority (App. B, 14). From this supposed temporal coincidence, respondents argue that an inference is compelled that the *reason* for creating the new departments was to assure that upon the

return to departmental seniority blacks would not have access to the jobs removed to the new departments (Br. Op. 17-18). The opinion of the Court of Appeals draws no such inference. And the full record facts do not support the drawing of an inference that the creation of these new departments was motivated by race.

At the outset, respondents' evidence indicates that the creation of the new departments occurred sometime between three and fifteen months prior to the return to departmental seniority (and does not fix the date as only two months prior).[4] And whatever the date of creation of these new departments, respondents have pointed to no evidence indicating that at the time the departments were created the parties anticipated that they would later negotiate a change from occupational to departmental seniority.

But even if it had been proved that at the time the departments were created a change to departmental seniority was anticipated, the record would not allow the inference that racial considerations prompted the creation of the departments. The five new departments contained only 51 employees, in a USW bargaining unit of more than 1600 employees. (PX 9). More than 1500 employees remained in racially-mixed units. *Id.* That the parties kept 94% of the employees in racially-mixed departments following the return to departmental senior-

---

[4] Respondents' evidentiary predicate for the allegation that the five new departments were created in June, 1954 is that the earliest seniority list reflecting the existence of these new departments is dated June 1, 1954 (PX. 9). However, the immediately prior seniority list was dated June 1, 1953 (PX. 8). All that can be inferred, therefore, is that the five new departments were created at sometime between June 1, 1953 and June 1, 1954. The return to departmental seniority was accomplished in an agreement signed on August 26, 1954 (PX 41). Thus the departments were created sometime between three and fifteen months prior to the switch to departmental seniority.

ity refutes the charge that they were creating new departments to separate the races.

Moreover, the particulars respecting the creation of the five new departments further belie any inference that race was a motivating factor. The newly-created Powerhouse (with five white employees) and Boilerhouse (with 3 white employees) had previously been part of the Maintenance Department (PX 8, 9); following their removal, the remaining population of the Maintenance Department was 49 whites and 14 blacks (PX 9). Creation of the Air Brake Department removed 22 whites from the racially-mixed Steel Erection Department, but 45 whites remained in the Steel Erection Department (PX 9). The separation of the Janitors (9 blacks) and Plant Protection employees (12 whites), who had been in separate departments prior to unionization, evidently was at the behest of a black member of USW's negotiating committee (App. 37a, 131a, n. 29), and prompted by job security concerns, not racial considerations.[5]

Yet another reason why the inference urged by respondents is untenable, is that even if these jobs had been retained in their existing departments the subsequent switch to departmental seniority would not have provided opportunities for blacks to bid to these jobs. It was not until 1956 that USW, for the first time, won the application of seniority for promotions. App. 26a. All that the conversion to departmental seniority meant in 1954 was that *layoffs* and *recalls* would be determined by departmental seniority. The predictable consequence of retaining the jobs in a single department would have been that, at a time of layoff, senior employees on the higher rated jobs would have been able to exercise their departmental seniority to displace junior occupants of the lower rated jobs, without affording senior employees

[5] The job security concerns are described in the next paragraph of the text.

on the lower rated jobs reciprocal opportunity to promote to the higher rated jobs.

Finally, the district court found, and the Court of Appeals did not dispute, that these newly created departments had analogues at Pullman's virtually all white plants (App. 37a).

D. *Events From 1954-1972*

There were no changes in departmental structure between 1954 and the adoption of new seniority provisions under the auspices of the Labor Department in 1972. (App. 27a). The populations of the departments in the USW bargaining unit as of June 1965 (just prior to the effective date of Title VII) are shown on a chart which appears at App. 77a. As that chart shows, there were at that time 1151 blacks and 1173 whites in the USW bargaining unit. Of these, 1025 blacks (89% of all blacks) and 1093 whites (93% of all whites) were in racially-mixed departments.